

**STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

Implementation of Renewables Portfolio       )  
Standard Legislation (Public Utilities Code    )  
Sections 381, 383.5, 399.11 through 399.15,   )  
and 445; [SB 1038], [SB 1078])                )

Docket No. 03-RPS-1078

**COMMENTS OF THE UTILITY REFORM NETWORK  
ON PHASE TWO IMPLEMENTATION ISSUES**

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PHASE TWO IMPLEMENTATION ISSUES**

In response to the California Energy Commission's notice seeking comments on phase two issues related to the implementation of the Renewables Portfolio Standard, The Utility Reform Network (TURN) submits the following recommendations for the allocation and awarding of Supplemental Energy payments and the design of an accounting and verification system. Rather than attempting to answer each question posed by the Committee, TURN offers specific recommendations for resolving several key issues presented in the staff workshops.

**I. Supplemental Energy Payment (SEP) Payment Guidelines**

In establishing SEP guidelines, the Commission should focus on coordinating its activities with those subject to the oversight of the Public Utilities Commission. This means that duplicative reviews should be generally avoided and that procurement activities should be sequenced to streamline determinations of eligibility and awards. TURN offers the following suggestions for achieving the proper balance.

A. Definition of “new” for purposes of SEP eligibility

The Commission should find that “new” projects eligible for SEP payments are those that achieve initial commercial operation after the date of the retail seller’s solicitation that led to a contract with costs in excess of the applicable market price referent. Rather than defaulting to whether the facility is simply post-1996, it would be far more appropriate to maintain the practice of ensuring that the facility is first placed into service after the award is encumbered. In past auctions conducted by the Commission for 5-year incentive payments, eligible generators were required to satisfy this same test. There is no reason to alter the rules at this juncture.

Consistent with this view, a facility receiving an approved SEP award should not be eligible for future payments from this fund. It would be inappropriate to allow ‘double dipping’ by a single project. Instead, the Commission can avoid this possible dilemma by limiting SEP eligibility to projects not yet operating.

This rule would also ensure that any out-of-state projects seeking SEPs for purchases to a California retail seller are, in fact, “developed with guaranteed contracts to sell its generation to end use customers subject to the funding requirements of Section 381” as required by SB 1038.<sup>1</sup> Since any out-of-state facility seeking SEPs could not be in commercial operation by

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<sup>1</sup> Cal. Pub. Util. Code §383.5(d)(2)(B)(ii).

the date of encumbrance, the Commission could evenhandedly apply this on-line date requirement to satisfy the statutory test.

B. Eligibility for generators with previously encumbered awards

To the extent that any renewable generator is already receiving production incentives with funds appropriated under SB 90, the Commission should deem such a facility ineligible for any future SEP awards. In the event that a generator had an award encumbered, but not disbursed, the Commission should allow the generator to relinquish its SB 90 award as a condition of being able to receive SEPs. The key distinction ties back to the definition of a “new” facility as one that has not yet achieved commercial operation.

Although TURN has proposed that the PUC direct the IOUs to consider SB 90 awards in the evaluation of all renewable resource bids, this directive does not guarantee consistent treatment of old and new award winners. In the event that an SB 90 award winner has its bid adjusted to account for this award, the utility could ultimately prefer the facility simply because the SB 90 award could lower the portion of the bid that can be allocated to the utility contract. If the presence of a SB 90 award allows a utility to pay sub-MPR prices, then the net impact (as compared to a case where the utility must pay the entire MPR before SEPs would be awarded) would be accelerated depletion of the Renewable Resource Trust Fund.

C. Pre-certification of eligible renewable energy resources

As indicated in filings before the CPUC, TURN believes that the CEC should establish a pre-qualifying process and encourage all potential bidders to seek an advance determination of eligibility for the RPS and SEP funds. In testimony, TURN argued that allowing projects to seek an advance determination would reduce the potential for litigation over eligibility during the PPA approval process at the CPUC and provide certainty with respect to SEP eligibility.<sup>2</sup> Moreover, the use of CEC pre-qualification will facilitate compliance by non-utility retail sellers that do not need or receive CPUC approval for renewable power purchases. This pre-qualification process should be linked to the CEC's program for tracking and verifying RPS compliance to minimize transaction and administrative costs for both programs.

D. Process for awarding SEPs

Both TURN and San Diego Gas & Electric (SDG&E) proposed Joint Principles for RPS implementation that outline a method for sequencing actions by the CPUC and CEC. The entire section of the Joint Principles addressing solicitation, evaluation and SEP awards is enclosed as attachment A. The Joint Principles call for the utility to provide relevant information to the CEC, at the time a PPA is submitted for CPUC approval, about the quantity of supplemental energy payments needed to support expected contract obligations.<sup>3</sup> The CEC should make a preliminary determination regarding the availability of PGC funds

prior to CPUC action approving any contracts. Assuming that sufficient funds are available, the CEC would then receive official notice from the CPUC once a PPA needing SEPs has been approved. The CEC would have 30 days from this notice to confirm the availability of SEPs, approve the award, and encumber the necessary PGC funds.

As a general matter, it is unwise for the CEC to use the SEP award process to revisit utility procurement choices or bid prices. So long as the project is deemed eligible for a SEP award, and the CPUC approves the contract consistent with the least-cost/best-fit evaluation process, the CEC should encumber the funds and execute the award. TURN would be concerned if the CEC process becomes an opportunity for aggrieved losing bidders to undermine the viability of other approved projects. To the extent that the Commission believes it needs to retain some additional control over SEP awards, it should adopt technology-specific payment caps consistent with SB 1038. As indicated below, TURN believes that such caps should be implemented only if they are deemed necessary after further experience with the RPS program.

E. The CEC lacks authority to conduct separate SEP solicitations for the IOUs

With the passage of SB 1078 and SB 1038, the legislature fundamentally redesigned the structure for disbursing funds from the CEC's Renewable Energy Programs. With these

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<sup>2</sup> For example, any ongoing controversies over geothermal eligibility raised by the California Biomass Energy Alliance during the recent interim procurement could be avoided by moving eligibility determinations to a pre-qualification process at the CEC.

<sup>3</sup> This assumes that the CPUC has established market price referents at this juncture.

changes, the Commission is charged with allocating funds from the “new” account solely to support procurement conducted under the Renewables Portfolio Standard. This structure places the CEC in the role of determining RPS resource eligibility, allocating funds between Renewable Energy Programs, and awarding supplemental energy payments to generators selling power used to satisfy RPS obligations by retail sellers.

Consistent with this framework, it would be inappropriate for the CEC to conduct separate SEP auctions for power sold to investor-owned utilities (IOUs). The auction process for power sold to IOUs will occur under CPUC oversight. There is no rationale for the CEC to duplicate, or potentially even frustrate, the statutory allocation of agency responsibility in this regard.

There is, however, an open question with respect to the mechanism for determining the proper SEP awards for power sold to other retail sellers such as Electric Service Providers (ESPs) and Community Aggregators.<sup>4</sup> TURN recommends that the CPUC take the first steps to design terms and conditions for compliance by these non-IOU entities. As part of that process, TURN and other parties may recommend that non-IOU retail sellers be required to procure renewable power subject to a minimum level of oversight by both the CPUC and CEC in order to ensure that transactions are not designed to manipulate the SEP award process. As this process unfolds, TURN hopes to work with both the CEC and CPUC to

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<sup>4</sup> Regardless of the resolution of this issue, TURN opposes the award of any SEPs for procurement in excess of the 20% RPS target.

design a system of appropriate oversight that provides comparable treatment to all retail sellers while protecting consumers against practices that would unnecessarily deplete public goods funds.

F. The CEC should not adopt SEP caps or project funding limits at this time

TURN recommends that the CEC delay any efforts to establish caps on the level of SEPs for particular technologies or resources. It would be premature to limit the level of payments in the absence of more experience with utility solicitations. More experience with such solicitations should be used to allow the CEC to determine both the appropriateness of instituting caps and the proper level for each technology. In order to benefit from this data, the Commission should continue to participate in the Procurement Review Groups (PRGs) for each IOU and review all solicitation results.

The Commission should also eliminate any limits on the amount of SEP funds that can be awarded to a particular project. Under SB 90, the Commission prohibited any single project from receiving more than 25 percent of funds awarded in a given auction. There is no rationale for continuing this limit under the RPS. Absent a repeal of this cap, the CEC could severely undermine IOU efforts to enter into long-term contracts with substantial amounts of new generation. It would be unreasonable to deter a utility from making large commitments to individual projects in a given auction cycle. To the extent that such commitments are unreasonable, the CPUC is charged with reviewing and approving utility practices prior to

any award of SEPs. Adding an additional layer of CEC review would not serve any valuable purpose and could create unnecessary conflict between the two agencies.

G. SEP funds should be subject to annual “soft allocations” by retail seller

TURN urges the Commission to take preliminary steps to comply with the SB 1038 requirement to manage PGC funds “in an equitable manner in order for retail sellers to meet their obligation” under the RPS.<sup>5</sup> Because retail sellers will be conducting solicitations throughout the course of a given year, and due to concerns over annual SEPs being disproportionately allocated to projects under contract to a single retail seller, the Commission should adopt a ‘soft allocation’ of total new account funds by retail seller.

This proposal envisions an initial annual allocation of funds by retail seller based on the pro-rata share of PGC contributions from its retail customers. To the extent that funds are not used by the retail seller in a given procurement cycle, any excess would be freed up for general use and could be awarded as SEPs to any eligible generator selling to any retail supplier. This concept would provide some assurance that no retail seller will be deprived of access to the funds for above-market procurement costs while also recognizing that the funds in the Renewable Resources Trust Fund do not exclusively belong to a particular utility or ESP.

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<sup>5</sup> Cal. Pub. Util. Code §383.5(d)(2)(A)(v).

TURN proposes that the new account funds for calendar year 2004 be allocated by utility with one general allocation for competitive service providers. Given the ongoing flux in direct access markets, it is not appropriate to link an allocation to a particular ESP. Assuming that there will be some rollover funds from both SB 90 and the 2002/03 money appropriated under SB 1038, the Commission should make those funds available if a retail seller enters into contracts that would require the encumbrance of more than its entire 2004 allocation. Starting this process in 2004 will allow the Commission to gain experience and refine the system for future years when the allocations may become more severe limitations on the activities of individual retail sellers.

Once the rollover funds are expended, the Commission should allow a retail seller to borrow from a future year allocation if it conducts procurement that is intended to exceed a current-year RPS annual procurement target. This allowance would encourage advance planning and procurement designed to be banked for future compliance. To the extent that a retail seller avails itself of CPUC-approved deferral mechanisms and does not execute long-term contracts in the current year, the Commission may want to preserve a portion of the current allocation (perhaps 50%) for a future year when the retail seller plans to procure to satisfy its compliance deferral.

TURN urges the Commission to carefully consider such a system and adopt, at minimum, a basic version of this soft allocation for 2004. In particular, such an allocation should

encourage retail sellers to minimize the SEPs necessary to meet annual targets by placing them on notice that their performance will be judged relative to other retail suppliers.

## **II. Principles for the development of an accounting and verification systems**

TURN strongly supports the Commission's efforts to develop a tracking and verification system to monitor compliance with the RPS. While the rollout of such a system must occur in a timely manner, the Commission is well-served to consider likely future expansions or application of such a system. In particular, TURN believes that the system should be able to allow participation by all interested western states and all retailers regardless of whether they are obligated by any state RPS. For example, the Commission should make it possible for municipal utilities to participate in the tracking system.<sup>6</sup>

In addition, the Commission should anticipate efforts to expand the system to track other pieces of data including air emissions and fuel sources for both renewable and non-renewable generators. This expansion would allow verification of retail product claims that extend beyond green attributes (like "no coal") and could permit enforcement of emissions portfolio requirements or carbon reduction initiatives.

With respect to out-of-state power, the system should be designed to certify in-state delivery requirements. TURN does not have a proposal for the use of particular data sources to verify

in-state delivery but believes that the Commission must incorporate this feature into the tracking system or risk the creation of additional and duplicative tracking mechanisms by California and other states to certify this requirement.

Finally, the Commission should use this system to track all renewable power production on the customer-side of the utility meter. TURN believes that, for small distributed systems that are not separately metered, the system can rely upon estimates that are derived from tested methodologies. The system design should not presume that either the customer or the utility takes ownership of the green certificates. Such ownership should be determined pursuant to PUC policy.

Respectfully submitted,

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<sup>6</sup> TURN believes that participation in the tracking system should be required for any municipal utility that sells renewable power to any retail seller seeking to use the purchase to demonstrate RPS compliance.

**Attachment A**  
*TURN/SDG&E Joint Principles*

**RPS solicitation protocols and sequencing issues**

- (1) The CEC should be encouraged to develop a process for pre-qualifying the eligibility of individual renewable projects for credit towards RPS obligations.
- (2) Solicitations should seek bids for renewable products of 10, 15, and 20 years, however, a shorter term should be allowed, where the bidder proposes such term and this term is acceptable to the utility. Protocols should allow for subsequent negotiations on price, length and terms based on the compilation of an initial short list. Bidders should not be required to submit a separate capacity and energy price.
- (3) IOUs should be permitted to conduct bilateral negotiations outside of RFOs under the following prescribed set of criteria. In order to achieve this objective, any MPRs established in a solicitation should remain in effect until new MPR(s) are established by Commission. The utility should have the option to explore bilateral market opportunities and file any contracts entered into outside of an RFO process with the Commission for approval, after consultation with members of the PRG to the extent it is still in existence. The utility should have the burden of establishing that the contract(s) is economically beneficial, fits into the utility's overall need, is consistent with actions taken in the utility's last RFO and is in the best interest of ratepayers. If the above-mentioned justifications are not present, the utility should have the opportunity to demonstrate other benefits of the proposed contract such as the contract is for power from a demonstration project or for a technology resource that would better balance the utility's portfolio of renewable resources. The Commission shall retain the authority to establish additional criteria, if necessary, to assure ratepayer benefits and minimize the opportunities for utilities or developers to circumvent or frustrate the RFO process.
- (4) Concurrent with the initiation of an RFO by an IOU, the IOU should file a notice by advice letter stating that the IOU has initiated an RFO. The Commission should then initiate its process to calculate market price referents. After the close of the RFO, the Commission should issue an expedited decision (through a resolution) establishing the updated market price referents for various products. Simultaneously, the IOUs should evaluate and rank bids, and commence negotiations with short list candidates. To the extent the PRG is still in existence, the IOU should also brief PRG members and share their recommendations prior to finalizing negotiations. Upon conclusion of negotiations, the IOU should submit proposed contracts to the CPUC and provide relevant information to the CEC in order to determine the availability of PGC funds. The IOU must provide documentation supporting the selection of these resources and estimated supplemental energy payments needed to provide the portion of the bid that is in excess of the

applicable MPR. Such information will be provided under the appropriate confidentiality provisions.

- (5) Market participants should be allowed an initial period to file protests followed by a utility response. Subsequent to the initial protests, non-market participants (parties currently in the procurement review groups) should be permitted to file protests that include responses to any concerns raised in the initial protest period. The utility should be permitted to file a response to any non-market participant protest(s).
- (6) Prior to Commission action approving any contracts, the CEC should provide a preliminary determination regarding the availability of PGC funds needed to provide supplemental energy payments. Upon approval of the contracts, the Commission shall inform the CEC and request the approval of any required supplemental energy payment awards. No longer than 30 days after CPUC approval, the CEC shall confirm the availability of SEPs and approve the required award.
- (7) All bid information, evaluation protocols, ranking results, and final contract data should be available to non-market participants (parties currently in the procurement review groups) who have signed confidentiality agreements. This data should be provided as available throughout the process, rather than deferring distribution until the submission of an advice letter seeking final contract approval.